IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BEAU E. NUGENT, Appellant.	No. 38553-8-II UNPUBLISHED OPINION

Van Deren, C.J. — A jury convicted Beau Nugent of eluding a pursuing police vehicle and theft of a motor vehicle. Nugent argues that (1) the amended information charging him with theft of a motor vehicle did not set out the essential elements of his crime, (2) the to-convict instruction for theft of a motor vehicle relieved the State of its burden of proving every element of the crime beyond a reasonable doubt, and (3) he received ineffective assistance of counsel because his attorney did not prevent the trial court's use of the to-convict instruction. We disagree and affirm Nugent's conviction.

FACTS

On July 12, 2008, Nugent found a car on the side of a road that appeared to be stolen and decided to take the car. A police officer spotted Nugent speeding in the stolen vehicle and pursued him. Nugent fled, eventually abandoning the car and attempting an aquatic escape via the

Hood Canal. With the help of a concerned citizen, the officer apprehended Nugent by using a boat and oar to force Nugent into the hands of officers near the shore.

The State charged Nugent with attempting to elude a pursuing police vehicle and possession of a stolen vehicle. The State later amended the charges to add theft of a motor vehicle. The information stated:

> In the County of Mason, State of Washington, on or about the 12th day of July, 2008, the above-named Defendant, BEAU E. NUGENT, did commit THEFT OF A MOTOR VEHICLE, a Class B Felony, in a 1994 Honda Accord, . . . contrary to RCW 9A.56.065 and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 47.

At trial, the State offered the trial court the instructions for the theft of a motor vehicle charge. Instruction 18, the to-convict instruction, read:

> To convict the defendant of the crime of theft of a motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 12th day of July, 2008, the defendant committed a theft of a motor vehicle;
> (2) That the acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 41. Instruction 15 stated, "A person commits the crime of theft of a motor vehicle when he or she commits theft of a motor vehicle."[1] CP at 38. Instruction 8 defined "motor vehicle" as "a vehicle that is self propelled." CP at 31. Instruction 16 stated, "Theft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to

[1] This instruction elicited some type of response—perhaps of a lighthearted nature—from the jury.

deprive that person of such property." CP at 39. And instruction 17 stated, "The intent to take or deprive a person of property need not be an intent to permanently take or deprive." CP at 40.

During closing arguments, the State discussed the relationship between the evidence and the two essential elements of theft—wrongfully obtaining or exerting "unauthorized control over the property of another" and "intent to deprive." Report of Proceedings (RP) at 228. Nugent argued during his closing argument that he was not the driver so he did not exercise control over the vehicle. In the alternative, Nugent argued that he did not intend to deprive the owner "for any length of time" because he merely intended to borrow the car to go swimming. RP at 244. The State countered that Nugent admitted to police that he took the car, which he believed to have been stolen, from the side of the road and drove it. The jury convicted Nugent of all three charges and the sentencing court dismissed the possession of a stolen vehicle charge.

Nugent appeals.

ANALYSIS

I. The Charging Document

Nugent argues that the State failed to provide proper notice of the theft of a motor vehicle charge because the information did not set out the elements of theft that are part of the definition section of chapter 9A.56 RCW.[2] The State argues that all of the essential elements of theft of a motor vehicle appear in RCW 9A.56.065 and that the State even referred to the specific vehicle in the information. We hold that the information is not defective because the jury convicted Nugent

[2] Nugent also argues, incorrectly, that there is also a knowledge element separate from "intent to deprive" in theft of a motor vehicle. Br. of Appellant at 10. Nugent confuses mens rea: Theft requires intent to deprive, while possession of stolen property requires knowledge. *Compare* RCW 9A.56.020(1) *with* RCW 9A.56.140(1).

of theft as defined under RCW 9A.56.020(1)(a), which corresponds with the common understanding of the term "theft."

A. Standard of Review

We review challenges to a charging document raised for the first time on appeal under a "rule of liberal construction." *State v. Kjorsvik*, 117 Wn.2d 93, 104, 812 P.2d 86 (1991). Under article 1, section 22 of the Washington Constitution, "'the accused shall have the right . . . to demand the nature and cause of the accusation against him,'" which requires that "[a] criminal defendant is to be provided with notice of all charged crimes." *State v. Schaffer*, 120 Wn.2d 616, 619, 845 P.2d 281 (1993). Our Supreme Court has interpreted this notice provision to require that the State include in the information all essential elements of the crime charged. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

Because Nugent did not make a timely objection to the information, we have "considerable leeway to imply the necessary allegations from the language of the charging document." *Kjorsvik*, 117 Wn.2d at 104. First, we determine whether we must reverse because the essential elements do not "appear in any form, [n]or by fair construction can they be found, in the charging document." *Kjorsvik*, 117 Wn.2d at 105.

"'A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result.'" *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). If the essential elements do appear in any form or by fair construction, we reverse if "the defendant show[s] that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice." *Kjorsvik*, 117 Wn.2d at 106;

Campbell, 125 Wn.2d at 802.

B. The Information

To convict a person of a crime involving theft, vehicle or otherwise, the State must show that the defendant either (1) wrongfully obtained or exerted "unauthorized control over the property or services of another or the value thereof," (2) obtained "control over the property or services of another" by "color or aid of deception," or (3) appropriated "lost or misdelivered property or services of another." RCW 9A.56.020(1). The State must also show that the defendant had the "intent to deprive" the other person of property or services. RCW 9A.56.020(1). And we have stated that "'intent to deprive' another of his property or services is an essential element necessary to support a conviction for *any* degree of theft defined in Title 9A." *State v. Kenney*, 23 Wn. App. 220, 224-25, 595 P.2d 52 (1979).

In dicta, our Supreme Court has stated:

> [T]he term "theft" is arguably adequate to convey an intentional, wrongful taking of the property of another. But the property value elements of [second and third degree theft] do not appear in any form in the information. Those charges are therefore constitutionally defective even assuming the "intent to deprive" element was adequately charged.

State v. Moavenzadeh, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998).

In reviewing the challenge to a information that resulted in a conviction for theft of a firearm where the information did not set out the elements of "theft," we agreed with our Supreme Court's basic premise:

> Theft means to wrongfully obtain or exert unauthorized control over the property of another with intent to deprive. RCW 9A.56.020(1)(a). The Supreme Court has said "the term 'theft' is arguably adequate to convey an intentional, wrongful taking of the property of another." *Moavenzadeh*, 135 Wn.2d at 364, Although dicta, we agree. The term "theft" is commonly understood to include taking property of another with the intent to deprive.

State v. Tresenriter, 101 Wn. App. 486, 494, 4 P.3d 145 (2000). Although *Moavenzadeh* could have more clearly stated that the common understanding of "theft" includes the "intent to deprive" element, our view in *Tresenriter* is supported by common usage because "theft" is defined as "the act of stealing; *specif*[*ically*] **:** the felonious taking and removing of personal property with intent to deprive the rightful owner of it." Webster's Third New International Dictionary 2369 (2002).

Here, the information charged Nugent with theft of a motor vehicle. The information also described the specific vehicle, which put Nugent on notice of the factual basis for the charge. Nugent makes no argument that he was prejudiced in any way by the information and we discern no prejudice from the record before us. We hold that the information need not set out the elements of RCW 9A.56.020(1)(a) because the common understanding of theft corresponds with that statutory definition.

II. Theft of a Motor Vehicle Instruction

Nugent also argues that instruction 18, the to-convict instruction, relieves the State of the requirement that it prove all of the elements of the charged crime because it ignores the elements necessary to prove theft, pointing to 11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* 70.26, at 76 (3d ed. 2008) (WPIC). The State argues that instruction 18 sets out the statutory elements and instruction 16 provides the definition of the word "theft" used in instruction 18, adequately setting out the elements such that the instructions, as a whole, did not relieve the State of its burden.

A. Standard of Review

"[W]e review a trial court's choice of jury instructions for abuse of discretion." *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). But we review a challenged jury instruction, including a to-convict instruction, de novo, evaluating it "in the context of the instructions as a whole." *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993); *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009); *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Challenges to a jury instruction asserting that it "relieved the State of its burden of proof . . . may be raised for the first time on appeal." *Brett*, 126 Wn.2d at 171. We uphold jury instructions "if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000).

Generally, all of the elements of the crime must appear in the to-convict instruction because it is the yardstick the jury uses to measure the evidence and determine guilt. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). Our Supreme Court defines "'elements of crime' as '[t]he constituent parts of a crime—usu[ally] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction.'" *Fisher*, 165 Wn.2d at 754 (alteration in original) (quoting Black's Law Dictionary 559 (8th ed. 2004)). Furthermore, Washington "cases also identify the statutory elements of a crime as the essential elements." *Fisher*, 165 Wn.2d at 754.

"[A]s a general legal principle all the pertinent law need not be incorporated in one instruction." *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). And it is well settled

that jury instructions "must be read together and viewed as a whole." *State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004); *see State v. Foster*, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). We also presume the jury followed the court's instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). But we do not expect a jury "to search the other instructions to see if another element alleged in the information should have been added to those specified in [the to-convict] instruction." *Emmanuel*, 42 Wn.2d at 819.

B. Theft of a Motor Vehicle

In 2007, the legislature created a new crime, "theft of a motor vehicle." 2007 Laws of Wash. ch. 199 § 2, at 742. The entire provision states: "(1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle. (2) Theft of a motor vehicle is a class B felony." RCW 9A.56.065. The chapter defines three modes of theft:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1).

The WPIC published after Nugent's conviction, recommends the following instruction for the crime of theft of a motor vehicle:

> To convict the defendant of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date), the defendant
>
> [(a) wrongfully obtained or exerted unauthorized control over a motor vehicle;] [or]
>
> [(b) by color or aid of deception, obtained control over a

> motor vehicle;] [or]
> [(c) appropriated a lost or misdelivered motor vehicle of another;
> and
> (2) That the defendant intended to deprive the other person of the motor vehicle; and
> (3) That this act occurred in the State of Washington.
> If you find from the evidence that elements (2) and (3), and any of the alternative elements [(1)(a)] [(1)(b)] or [(1)(c)], have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives [(1)(a)] [(1)(b)] or [(1)(c)] has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

WPIC 70.26 (alterations in original).

A to-convict instruction need not encompass all information relevant to the jury's inquiry. For instance, Division One of this court held that the use of the word "assault" in a to-convict instruction for burglary did not even require a definition of the "assault" element because "[t]he word 'assault' is not exclusively of legal cognizance, and an understanding of its meaning can fairly be imputed to laymen." *State v. Pawling*, 23 Wn. App. 226, 233, 597 P.2d 1367 (1979). Similarly, a trial court need not include the elements of the underlying substantive crime in the to-convict instruction for attempt. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). And in a to-convict instruction for robbery, our Supreme Court held the element of "theft" to be a "term of sufficient common understanding to allow the jury to convict of robbery" without any definition of theft in any of the jury instructions. *State v. Ng*, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988). These cases underscore the reasoning behind the holding in *Emmanuel* that trial courts must guard against instructing the jury that it may convict the defendant if it finds a set of specific

elements; when, in reality, additional essential elements exist that the trial court neglected to include in the to-convict instruction. 42 Wn.2d at 819.

Although the new WPIC on theft of a motor vehicle provides a more detailed and thorough to-convict instruction, we cannot say that instruction 18 relieved the State of its burden. Here, the to-convict instruction mirrors the simplicity of the statutory language: "That on or about the 12th day of July, 2008, the defendant committed a theft of a motor vehicle." CP at 41; *see* RCW 9A.56.065. But the to-convict instruction did not exist in a vacuum—the trial court set out (1) the statutory definition of the crime in instruction 15; (2) a definition of "motor vehicle" in Instruction 8, (3) the definition of "theft" in instruction 16, which corresponds to the common understanding of "theft," as similarly defined in RCW 9A.56.020(1)(a); (4) intent to deprive in instruction 17; and (5) "theft of a motor vehicle" as the all encompassing element in the to-convict instruction. CP at 31, 38-41. Had the trial court included the actus reus of theft in instruction 18 but omitted the mens rea, stated that the to-convict instruction was a complete statement of the crime, or included an incorrect definition of one of the elements in the related instructions, Nugent's arguments would align more closely with the facts in *Emmanuel*. *See Mills*, 154 Wn.2d at 7.

Where, as here, a trial court crafts a to-convict instruction based on statutory language and the trial court includes in separate instructions the definitions of key terms that expand on the essential elements of the crime, the State is not relieved of its burden to prove all of a crime's elements. The trial court instructed the jury to "consider the instructions as a whole," and nothing in the record leads us to believe the jury acted otherwise. CP at 22. Although we recognize the convenience of the new WPIC 70.26, we cannot fault the trial court for a set of instructions that

did not identically mirror an instruction crafted and made available by the Washington Pattern Jury Instruction Committee over a year after the legislature's passage of law defining the crime and months after Nugent's conviction. *See* 2007 Laws of Wash. ch. 199 § 30, at 778; WPIC 70.26.

The WPICs may attempt to be a thorough statement of the law, but to-convict pattern instructions are not definitional. *See State v. Reed*, 150 Wn. App. 761, 770-75, 208 P.3d 1274, *review denied*, 167 Wn.2d 106 (2009); *State v. Keend*, 140 Wn. App. 858, 865-68, 166 P.3d 1268 (2007), *review denied*, 163 Wn.2d 1041 (2008). To-convict instructions need not be a definitive statement of all aspects of a crime as long as the instructions as a whole do not relieve the State of its burden. Here, the State and Nugent operated under the assumption that the instructions did not relieve the State of its burden to prove all of the elements of the crime. Under the unique facts[3] of this case, we hold that the instructions, taken as a whole, did not relieve the State of proving all of the elements of theft of a motor vehicle.

III. Ineffective Assistance of Counsel

Nugent also argues that his trial counsel was ineffective because "the invited error doctrine precludes review of any instructional error—including, as here, one of constitutional magnitude—where the instructions [are] proposed by the defendant." Br. of Appellant at 7. We note that the defendant did not propose the instructions. But even if the defendant proposed these instructions, the invited error doctrine does not apply to preclude the challenge of an

[3] It is a rare situation where several different definitions can constitute the same subelement of a crime, the relevant definition of the subelement corresponds to the public's common understanding of the crime, the essential subelements of the crime appear in a separate definition section, a new crime is created that criminalizes a specific factual situation already covered by other statutes, and the trial court is forced to assemble its own to-convict instruction.

instruction alleged to relieve the State of its burden to prove every element of a crime. *See State v. Kyllo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Thus we need not reach this argument.

We affirm Nugent's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C. J.

We concur:

Houghton, J.

Penoyar, J.